KAY HIAN PTE LTD

v.

MA BOON LAN

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
MOHD NOOR AHMAD JCA
PS GILL JCA
[CIVIL APPEAL NO: Q-02-425-2001]
8 AUGUST 2003

CONTRACT: *Breach - Shares - Appeal against dismissal of claim by plaintiff stockbroker for moneys owing - Whether claim justified - Whether plaintiff sold shares pledged as collateral without sanction - Whether assessment of evidence by trial judge was proper*

EVIDENCE: *Documentary evidence - Handwritten ledger - Admissibility under s. 34 Evidence Act 1950 - Whether entries kept in the course of business - Whether entries refer to a matter into which court has to inquire*

EVIDENCE: *Documentary evidence - Computer print out, certified copy - Admissibility - Whether person who keyed in information should be called as witness to verify print out - Whether s. 90A Evidence Act 1950 allowed admissibility of print out*

CIVIL PROCEDURE: *Trial - Conduct of proceedings - Assessment of evidence by judge who took over case from retiring judge - Whether proper - Whether judge should have recalled and re-examined witnesses in light of conflicting evidence between parties - Whether judge erred when he overruled retiring judge's decision on admissibility of documents*

The plaintiff, a firm of stockbrokers in Singapore, claimed a sum of S$21,993.41 from the defendant owing under an agreement ('the said agreement') executed between them. Under the agreement, the defendant was granted credit and trading facilities in relation to public listed shares with a trading limit of S$500,000. The plaintiff claimed that the defendant failed to top-up his account and that led to the plaintiff selling the defendant's 287,000 shares ('said shares') which still left a deficit of S$21,993.41. The defendant denied the plaintiff's claim and instead counter-claimed for the return of the said shares, alleging that they were pledged with the plaintiff as collateral and sold without his sanction. The trial judge ('the 1st trial

judge') hearing the case subsequently retired without hearing the submissions of counsel at the close of the case. They were heard by another judge ('the 2nd trial judge') who dismissed the plaintiff's claim and allowed the defendant's counterclaim. Hence, the plaintiff's appeal to this court.

The issues, *inter alia*, were: (1) whether the 2nd trial judge validly ruled inadmissible certain documents, exhs. P5B and P4A, that were held admissible by the 1st trial judge; and (2) whether the plaintiff's claim against the defendant for the sum owing and its sale of the defendant's said shares were justified.

Held:
Per Pajan Singh Gill JCA

[1] The ruling of the 2nd judge on the inadmissibility of the said documents militated against the doctrine of *res judicata*. Furthermore, the 2nd trial judge merely reheard submissions at the end of the defence case. There was no re-submission on any procedural issues. Hence, the 2nd trial judge's ruling on the admissibility of the said documents was flawed. Nevertheless, the handwritten ledger, exh. P5B had complied with the conditions of admissibility under s. 34 of the Evidence Act 1950 ('the Act'). Also, the 2nd trial judge was wrong in ruling that the certified copy of the computerised monthly account, exh. P4A, was inadmissible because the person who keyed in the relevant information was not called in as a witness. Section 90A of the Act allowed the admissibility of documents by computer, and of statements contained therein subject to requirements satisfied. It followed, therefore, that exhs. P5B and P4A were admissible. (pp 731 h, 732 a-c, 733 a-g & 734 d-g)

[2] The trial judge made an erroneous finding of fact that the sale of the said shares was not a force sale and that the defendant's remisier, PW1, sold the said shares to get his commission. PW1 had stated clearly in evidence that the defendant deposited the said shares with the plaintiff. These shares were sold between 9 January 1985 and 30 July 1985 and the defendant was kept informed of the sales. The defendant at no time complained about the sale of the said shares whether orally or by letter. In fact the plaintiff had the right to sell the said shares under cl. 5(1)(a) and (b) of the said agreement if the proceeds of sale of shares were insufficient to satisfy the sum owed by the defendant without any notice to him. (pp 735 f-g & 737 g)

[3] The trial judge also erroneously concluded that the said shares were sold on the instructions of PW1. In fact, PW1 in his evidence merely confirmed the practice of the plaintiff to sell collateral under the terms of the agreement whenever the proceeds of the sales of shares were insufficient. (p 738 a)

[4] When a case is continued before another judge, and not heard *de novo*, the presiding judge should be at liberty to recall and re-examine any witnesses and to re-submit on any point. The trial, though, may be continued on the evidence of the earlier judge's notes. In the present case, although the 2nd trial judge was confronted with conflicting evidence from the plaintiff's and defendant's witnesses, he made no attempt to recall these witnesses for purposes of evaluating their credibility. Hence, the assessment of evidence by the 2nd trial judge must be viewed with caution. It followed, therefore, that the plaintiff had established its claim against the defendant on a balance of probabilities. (p 738 e-g)

[Appeal by plaintiff allowed; defendant's counterclaim dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif ialah sebuah firma di Singapore yang membeli dan menjual saham. Plaintif menuntut wang sebanyak S$21,993.41 daripada defendan di bawah satu perjanjian ('perjanjian tersebut') yang plaintif mendakwa defendan berhutang kepada plaintif. Di bawah perjanjian tersebut, defendan telah diberikan kemudahan kredit dan perniagaan berkenaan saham yang disenaraiawamkan dengan had perniagaan hingga S$500,000. Plaintif mendakwa bahawa defendan gagal untuk memenuhi kekurangan dalam akaunnya dan ini telah membawa kepada plaintif menjual 287,000 saham defendan ('saham tersebut') untuk memenuhi kekurangan tersebut tetapi masih terdapat kekurangan sebanyak S$21,993.41. Defendan menafikan tuntutan plaintif dan sebaliknya menuntut balas untuk pengembalian saham tersebut yang didakwa digadaikan dengan plaintif sebagai kolateral dan dijual tanpa kebenarannya. Hakim bicara ('hakim bicara pertama') yang mendengarkan kes bersara tanpa mendengarkan hujahan kaunsel pada penutup kes. Kes seterusnya didengar oleh hakim lain ('hakim bicara kedua') yang menolak tuntutan plaintif dan membenarkan tuntutan balas defendan. Maka rayuan plaintif kepada mahkamah ini.

Isu-isu, *inter alia*, ialah: (1) keesahan perintah hakim bicara kedua terhadap ketidakbolehterimaan dokumen-dokumen tertentu, eks. P5B dan P4A, yang telah diputuskan boleh diterima oleh hakim bicara pertama; dan (2) sama ada tuntutan plaintif terhadap defendan untuk jumlah wang berhutang dan penjualan saham tersebut oleh plaintif diwajarkan.

Diputuskan:
Oleh Pajan Singh Gill HMR

[1] Perintah hakim bicara kedua bahawa dokumen-dokumen berkenaan tidak boleh diterima adalah salah kerana bertentangan dengan doktrin *res judicata*. Lagipun, hakim bicara kedua hanya mendengar semula penghujahan pada penutup kes pembelaan. Tiada penghujahan semula yang dibuat atas mana-mana isu prosedur. Maka, perintah hakim bicara kedua atas ketidakbolehterimaan dokumen-dokumen berkenaan adalah salah. Namun demikian, lejar bertulis, eks. P5B, telah memenuhi syarat-syarat kebolehterimaan di bawah s. 34 Akta Keterangan 1950 ('Akta tersebut'). Juga, hakim bicara kedua salah memutuskan bahawa salinan akaun bulanan cetakan komputer yang diperakui, eks. P4A, tidak boleh diterima masuk kerana orang yang memasukkan maklumat berkenaan tidak dipanggil sebagai saksi. Seksyen 90A Akta tersebut membenarkan kebolehterimaan dokumen-dokumen cetakan komputer dan kenyataan-kenyataan yang terkandung di dalamnya asalkan syarat-syarat dipenuhi.

[2] Hakim bicara salah memutuskan bahawa penjualan saham tersebut bukan penjualan yang terpaksa dibuat dan remisier defendan, PW1, menjual saham tersebut untuk mendapatkan komisyennya. PW1 jelas mengatakan dalam keterangannya bahawa defendan mendepositkan saham tersebut dengan plaintif. Saham tersebut dijual di antara 9 Januari 1985 dan 30 Julai 1985 dan defendan diberitahu mengenai jualan-jualan tersebut. Defendan tidak pernah membantah penjualan saham tersebut sama ada secara lisan atau melalui surat. Malah di bawah kl. 5(1)(a) dan (b) perjanjian tersebut, plaintif mempunyai hak menjual kolateral, tanpa apa-apa notis kepada defendan, jika hasil jualan saham tidak mencukupi untuk mengatasi jumlah wang yang dihutang oleh defendan kepada plaintif.

[3] Hakim bicara juga salah memutuskan yang saham tersebut dijual atas arahan PW1. PW1 dalam keterangannya hanya mengesahkan praktis plaintif menjual kolateral di bawah terma-terma perjanjian apabila hasil jualan saham tidak mencukupi.

[4] Apabila sesuatu kes diteruskan di hadapan hakim lain dan bukan didengar *de novo*, hakim yang mendengar kes itu boleh memanggil atau memeriksa semula saksi-saksi untuk menghujah semula atas isu-isu yang hendak dibicarakan. Namun, perbicaraan boleh diteruskan atas keterangan nota hakim sebelumnya. Dalam kes semasa, walaupun terdapat keterangan yang bertentangan oleh saksi-saksi plaintif dan defendan, hakim bicara kedua tidak mencuba untuk memanggil saksi-saksi tersebut bagi tujuan menilaikan kebolehpercayaan mereka. Dengan itu, penilaian keterangan hakim bicara kedua mesti dipandang dengan waspada. Maka, plaintif telah berjaya dalam tuntutannya terhadap defendan atas imbangan kebarangkalian.

Rayuan plaintif dibenarkan; tuntutan balas defendan ditolak.]

Case(s) referred to:

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Mui Bank Bhd Johore v. Tee Puat Kuay [1993] 4 CLJ 69 HC ***(refd)***

Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] CLJ (Rep) 635 HC ***(refd)***

Shanmugam v. Pitchamany & Anor [1976] 2 MLJ 222

Sim Siok Eng & Anor v. Poh Hua Transport and Contractor Sdn Bhd [1980] 2 MLJ 72 ***(foll)***

Syarikat Jengka Sdn Bhd v. Abdul Rashid Harun [1981] 1 MLJ 201 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 34, 73A, 90A(2), (3)

For the appellant - Tai Choi Yu; M/s Tai Choi Yu & Co

For the respondent - Jimmy HT Wee (Partick Liaw); M/s Jimmy HT Wee & Co

[Appeal from High Court, Miri; Suit No MR: 83/1987]

Reported by Usha Thiagarajah

JUDGMENT

PS Gill JCA:

The plaintiff, a firm of stockbrokers in Singapore, and a member of the Singapore Stock Exchange claim a sum of S$21,993. 41 from the defendant as on 1 October 1985 with interest thereon at the rate of 1.2% per mensem from 1 October 1985 for full payment payable, and owing under an agreement dated 15 October 1984. Under the term of the agreement, the

defendant requested, and was granted certain credit, and trading facilities relating to transaction and/or trading and/or sale and purchase of public listed shares.

The defendant denied the claim, and instead counterclaimed for the return of 287,000 shares pledged with the plaintiff as security for margin facilities S$500,000 and/or in the alternate damages for the conversion of the shares by the plaintiff amounting to a sum of $366,106.36.

The learned trial judge dismissed the plaintiff's claim with costs, and allowed that counterclaim of the defendant with costs.

The agreed facts (marked "F" by the court on 9 February 1998) dated 3 March 1997 are as follows:

(1) The plaintiff is and was at all material times stockbroker and member of the Singapore Stock Exchange.

(2) The defendant entered in to an agreement with the plaintiff on 15 October 1984 whereby the plaintiff, at the defendant's request, agreed to grant credit facilities to the defendant to pay for the shares to be purchased by the defendant from or through the plaintiff and the defendant further agreed and undertook, *inter alia:*

(a) that the plaintiff shall hold all the shares purchased by the defendant as security for the outstanding credit facilities;

(b) that the defendant shall deposit as collateral security with the plaintiff a sum equivalent to S$3 for every S$10 worth of shares purchased by the defendant on credit from the plaintiff;

(c) that if at any time after such purchase and/or at any time during the credit period the shares and/or other securities held by the plaintiff as collateral security fall in value the defendant shall within five (5) days from the receipt of the plaintiffs notice in writing deposit such further sum or sums of monies and/or other securities as are required and accepted by the plaintiff as further collateral security;

(d) that the defendant will pay interest for the outstanding credit facilities at the rate of 1.2% per mensem or at such other rate as the plaintiff may by notice impose, such interest to be paid every thirty (30) days with or without formal demand from the plaintiff failing which all outstanding and/or unpaid interest shall be deemed

to become part of the defendant's principal debt to the plaintiff and interest shall be paid also on such outstanding and/or unpaid interest sums at the aforesaid rate until full settlement;

(e) that if the defendant shall be in breach of any conditions contained in the said agreement, the plaintiff may without notice to the defendant:

(i) terminate all credit arrangements and, at the plaintiff's own judgment as to timing, dispose of by private treaty and/or through the Stock Exchange the shares held by the plaintiff; and

(ii) if the proceeds of the sale of the shares are insufficient to satisfy the sums owing by the defendant to the plaintiff, the plaintiff shall be at liberty and without notice to the defendant to utilize all sums of cash and sell and/or dispose of all securities held and/or deposited with the plaintiff as collateral security to satisfy such outstanding sums as are owing by the defendant to the plaintiff;

(f) that the defendant irrevocably appoints the plaintiffs remisier William Wee as the defendant's agent to receive all and any notices, certificates, contract notes, demands and proceedings that are sent to the defendant, and, that all the said notices, etc. served and/or signified as received by the said agent shall be deemed to be duly served and received by the defendant;

(g) that notwithstanding the security and collateral security given by the defendant to the plaintiff, the defendant will be responsible for all outstanding sums owing by the defendant to the plaintiff and the plaintiff may take anyaction necessary until the plaintiff recover 100 cents to the dollar in respect of any outstanding debt to the plaintiff; and

(h) that a statement or certificates by any of the plaintiff's authorised officers as to the monies commissions liabilities for the time being owing or incurred by the defendant and/or as to any valuation of securities shall be final and binding on the defendant, and that any challenge to any computation of valuation may only be made by the defendant within two (2) days of the receipt of the same.

The 1st trial judge who heard the case was the then Honourable Judicial Commissioner, Ms. Elizabeth Chapman (hereinafter referred to as the 1st trial judge). Unfortunately, her ladyship left the Judicial Service without having the benefit of hearing the submissions of counsel at the close of the case. By consent, the submissions were heard by YA Dato' Hasan bin Lah (hereinafter referred to as the 2nd trial judge) who had taken over the conduct of the case. We have mentioned these facts, as they would have some bearing on our reasons later on in the grounds of judgment.

Both the plaintiff and the defendants agree that an agreement was entered into between them dated 15 October 1984, and that the terms of the agreement govern the shares margin, and business transactions between the parties. The plaintiff's evidence was that it was the defendant who had breached the agreement. The agreement executed by the defendant gave him a trading limit to purchase shares on a settlement basis to the value of $500,000. The application form was signed by him, and witnessed by Mr. William Wee who was a remisier, and duly appointed agent of the defendant. The agreement also stated that the defendant was bound by the terms of the agreement.

It was the plaintiff's contention that at the defendant's request which was communicated to the plaintiff from time to time, various share transactions were carried on between the parties, commencing on 16 October 1984 till 30 September 1985. According to the plaintiff the defendant deposited 62,000 shares as additional collaterals in August 1985, and the relationship between the plaintiff and the defendant was good till August 1985.

On 3 September 1985 the plaintiff issued a notice to the defendant for margin call, and the shares purchased by the defendant and/or the collaterals fell in value to the extent that the defendant was required to pay top-up to the value of S$143,000. However, the defendant failed to do so, and consequently the plaintiff terminated the facilities, sold the shares held by the defendant, resulting in a nett amount of S$21,993.41 owing to the plaintiff.

Defendant denied owing the sum of S$21,993.41 to the plaintiff. He admitted that he traded in the buying and selling of shares through the plaintiff but he was emphatic that his transaction did not breach the limit of S$500,000 granted to him. He denied asking for an increase in his credit facilities, and also denied that he had pledged an additional collateral to the plaintiff, apart from the 287,000 shares initially pledged to the plaintiff, in 1984, the value of which, in his view, was more than sufficient to meet his

obligation without having to break a margin call. Lastly, he denied having instructed the plaintiff or his agent to sell any of the 287,000 collaterals, and therefore filed a counterclaim for the return of the collateral, or damages.

In the course of the trial, plaintiff did not produce the contract notes relating to the claim. PW3, Vincent Goh Swee Chew who was the Manager of the Margin Department of the plaintiff company stated that the defendant requested for copies of the contract notes on 16 December 1993 – eight years after the transactions had taken place. The company records were kept only for seven years, and hence the inability of the company to comply with defendant's request. From the outset, we wish to state that we are in agreement with the learned trial judge that the non-production of the contract notes is not fatal to the plaintiff's case. This is because there is no dispute that the transactions contained in P5(B)(1) to (38) were carried out. What is disputed upon, we find is whether the transactions were carried out on the instructions of the defendant or not.

The plaintiff at the trial which commenced on 6 March 1997, some twelve years after the transaction had taken place produced the following documents to support its claim:

(a) A handwritten ledger allegedly containing the entries of all the buy and sell transactions of the defendant from 16 October 1984 to 30 September 1985 including the sale of the collaterals (287,000 shares) and the additional collaterals (62,000 shares) held. This handwritten ledger is marked exh. P5B(1) to (38) in Bundle E at p. 2 to 39.

It was reproduced in computer print-out by the defendant at p. 40(1) to 40(38) in Bundle E.

(b) Certified copy of a computerized monthly account marked as "P4A" allegedly from which the handwritten ledger was produced.

(c) Summary of account dated 21 November marked as exh. P8 containing a summary of account allegedly owned by the defendant to the plaintiff which information was extracted also from the handwritten ledger.

(d) Exhibit P1 Diary kept by PW1 of all transactions relating to the trading of shares by the defendant.

At the outset, it must be borne in mind, that when the abovementioned documents were introduced as exhibits at the trial before the 1st trial judge, counsel for the defendant raised no objection, and as such they were properly admitted, and marked accordingly.

More pertinently, however, was the fact that these very documents later formed the basis of serious objection by counsel for the defendant in his submission at the close of the case before the 2nd trial judge who then overruled the ruling of the 1st trial judge on the admissibility of the said exhibits.

Now two issues arise here that we consider relevant. Firstly, can counsel raise a valid objection at the conclusion of a trial to documents properly tendered, and marked at a trial, and not objected to by counsel, when the documents were first tendered as exhibits?

Secondly, and more important than that, can a judge who hears only submissions at the end of a trial overrule the ruling of the trial judge who had heard evidence at the trial, and had properly admitted the exhibits?

We begin by addressing the second issue, and can do no better than reiterate the principles enunciated in the case of *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, on the issue of a finality of a ruling made by a judge on issues of procedure such as the admissibility of documents as in the present case. This court has stated in clear and lucid terms as follows:

> We cannot over emphasize the proposition that once a judge makes a ruling substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened wily-nilly. One may ask: how is this approach to be reconciled with the decision in *Harrison*? The answer to that question lies in recognizing that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

On the strength of the abovementioned dicta, the ruling of the 2nd judge on the admissibility of the said documents that were ruled admissible by the 1st judge would be in error, as it militates against the doctrine of *'Res Judicata'*.

But the matter does not rest here, for the matrix in this case is slightly different in that, the case was continued by the 2nd trial judge, on the retirement of the 1st trial judge. As a rule, since the case was not heard *de novo*, the 2nd trial judge was entitled with the consent of the parties to recall, and examine any witness that he may wish, and the parties are given the liberty to resubmit on any point previously canvassed. See *Shanmugam v. Pitchamany & Anor* [1976] 2 MLJ p. 222.

By allowing parties to resubmit on any point, we would take it to mean that a different ruling on a previously raised procedural issue could be made by the 2nd trial judge. Was this the case in this instance? We think not, as the 2nd trial judge reheard merely submissions by counsels at the end of the defence case. There was no re-submission to speak of on any procedural issues, and hence the 2nd trial judge's ruling on the admissibility of the said documents in his grounds of judgment was flawed.

In the event, we are held wrong on both courts, we now address our mind to the admissibility on each of the documents held to be inadmissible by the 2nd judge. Forefront to our minds, is that inadmissible evidence does not become admissible simply by reason of failure to object. See *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635, and *Mui Bank Bhd Johore v. Tee Puat Kuay* [1993] 4 CLJ 69.

Now What About The Documents

1. Handwritten Ledger Exhibit P5(B)(1) to (38)

In respect of the exhibit, much was made if the fact that the handwritten ledger was prepared by the Margin Department of the plaintiff company, and not PW1. PW1 according to the evidence was not able to confirm when the information to prepare the ledger comes from. Ideally the maker of the said document should have been called, but was not. It is apparent, however, that the relevance of the document cannot be underscored.

Counsel for the plaintiff had attempted to introduce the said exhibit under the provisions of s. 34 of the Evidence Act 1950. Section 34 of the Evidence Act contemplates two conditions of admissibility in respect of the handwritten ledger *viz-a-viz*:

(a) the enteries are in a book regularly kept in the course of business; and

(b) the enteries therein refer to a matter into which the court has to inquire per Salleh Abas FJ (as he then was) in *Sim Siok Eng & Anor v. Poh Hua Transport and Contractor Sdn Bhd* [1980] 2 MLJ 72.

Failure to prove these conditions of admissibility would render the book of accounts inadmissible, as per Salleh Abas FJ (as he then was) in *Syarikat Jengka Sdn Bhd v. Abdul Rashid bin Harun* [1981] 1 MLJ 201, 203 (FC).

So much for the law and now to the matter before us. We are not in agreement with the reasoning of the learned trial judge that s. 34 of the Evidence Act 1950 only deals with relevancy, and not admissibility of the said documents. The trial judge took the view that admissibility of the document must be established solely by virtue of s. 73A Evidence Act 1950.

We disagree, simply because we find on the strength of the authority of *Sim Siok Eng (supra)*, s. 34 of the Evidence Act 1950 deals with both the admissibility, and relevancy pertaining to the enteries in the book of accounts.

Proof of the condition that the enteries refer to a matter into which the court has to enquire would generally we feel pose no problem. We find what is of concern here is proof that the entry in the said book of accounts is regularly kept in the course of business.

We hold that judging from the said exhibit, and the system in which it was kept, it is clear beyond doubt that the making of the enteries in the ledger does indicate, it is a book of accounts kept as business. We are further fortified by the evidence of PW3 on the manner in which the accounts were maintained in the ledger in the past, and present.

For these reasons, we find that the enteries in the handwritten ledger P5(B)(1) to (38), and the summary of accounts marked as P8 which was culled from P5(B)(1) to (38) are admissible, and relevant as evidence against the defendant.

2. Certified Copy Of Computerized Monthly Account P4A

In respect of the exhibit, the learned trial judge had ruled against the admissibility of this document, as he felt that the requirements of s. 90A(2) of the Evidence Act 1950 had not been complied with. Further, it was the contention of the trial judge that he was unable to agree with the proposition put forward by the plaintiff's counsel that the said exhibit was a distinct document of the Singapore Stock Exchange as the input of this document

was in fact keyed in by the plaintiff using the computer system of the Singapore Stock Exchange. As the person who keyed it in was not called as a witness, the trial judge opined that the document was not admissible.

Though we were initially perturbed that no certification was issued pursuant to s. 90A(2) of the Evidence Act 1950 in respect of the certified computerized monthly account (P4A) we find that the evidence tendered by PW2 Daniel Tan Bak Hiang, is material evidence, in lieu of this certificate. The said witness had categorically stated that he had no reason to believe that the said exhibit was not produced by their computer system, and went on to describe the activities for which the computer was used. To our minds, the *viva voce* evidence of the witness falls within the short compass of s. 90(2) and (3) of the Evidence Act 1950 and effectively fills the pre-requisite of s. 90(A)(2) and (3) of the Evidence Act.

The trial judge had further ruled against the admissibility of P4A on the grounds that the person who keyed in the information into the computer system of the Singapore Stock Exchange was not called as a witness. Once again, we believe that the trial judge fell into error as he seemed to have failed to appreciate the impact of s. 90A which allows the admissibility of documents produced by computer, and of statements contained therein subject to the requirements being satisfied. The weight, however, to be attached to the document, is we believe, another matter. To thus to reject P4A as the trial judge did on the basis that the person who keyed in the information was not called as a witness is with respect, fallacious.

As to the weight to be attached to P4A, we find no reason to doubt the veracity of PW2's evidence, or the accuracy, and purpose of the said document. No strenuous challenge was made, as to the supply of such information, and to that end we hold the document P4A should be given due weight.

It is thus our considered view that the exh. P5B(1)-(38), and P4 are admissible.

And Now To The Disputable Facts

The main bone of contention between the plaintiff and defendant was that the defendant alleged that he never instructed plaintiff to sell the 287,009 shares pledged by him as collateral securities. In this respect, the defendant denied receiving any margin call notices from plaintiff informing him that for the securities held by the plaintiff the margin of the securities was short of S$143,000. In fact, PW1, William Wee, the agent of the defendant, stated

that he immediately informed the defendant of the said notices by phone. Wee had also met the defendant in Miri on 24 August 1985 to confer with the defendant on need to top-up the securities. The failure by the defendant to top-up his account resulted in the sale of the collateral securities as provided for in cl. 5(b) of the agreement.

It must be noted that both PW2, PW3 and PW4 all testified that the defendant owed the plaintiff S$21,993.41 as on 1 October 1985. PW2 stated that according to exh. P4A the Stock Exchange print-out, the ledger entry dates, were stated in the print-out, and was adamant that the exhibit was accurate. PW3 tendered exh. P5A, and P5B(1) to 38) the plaintiff's hand written ledger account (1984-1985). He reiterated that the Notice of Margin Call was served on the defendant's remisier, PW1, as well as the defendant on 3 September 1985. Having examined the ledger entry account, exh. P5B(1) to (38) he confirmed that the defendant was indebted to the plaintiff for a sum of S$21,993.41.

The defendant admitted in evidence that Mr. William Wee was his agent as stated in cl. 7 of the agreement. Further the terms and conditions of the trading account were clear, giving wide discretion to the plaintiff to sell the shares as and when plaintiff deemed it necessary.

Furthermore, under cl. 8(f) of the said agreement, a statement or certificate relating to the defendant's financial affair shall be final, and binding on the defendant unless he challenges the composition within two (2) days of the receipt of the same if the shares were not paid for within the period allowed. These documents were supplied to the defendant, and he made no complaint. On this score alone he is estopped from challenging it now.

The trial judge made a finding of fact that the sale of the collaterals was not force sale, and that PW1 had good reason to sell the collaterals as he would get a commission from the transaction. The trial judge arrived at this erroneous conclusion without sifting through the evidence adequately adduced at the trial. PW1 stated clearly in evidence that the 287,000 shares were deposited with the plaintiff by the defendant. These shares were sold between 9 January 1985 and 30 July 1985 and the defendant was kept informed of these sales. Defendant at no time complained about the sale of the collaterals whether orally or by letter. The collaterals we feel were sold by the plaintiff in accordance to the terms of the agreement, and the sale was sanctioned by the defendant.

The counterclaim of the defendant was premised on the fact that the plaintiff disposed of the 287,000 shares without his consent, and the sale constituted a wrongful interference with the defendant right to ownership of the shares. The trial judge erred in arriving at the conclusion that the collateral shares were sold without the defendant's consent and knowledge. The plaintiff had in fact given detailed documentary evidence of the share transactions conducted on behalf of the defendant, such as the plaintiff's hand written ledger, and the Singapore Stock Exchange Computed print-out P4A.

The defendant's agent was appointed by him under the terms of the agreement. If in fact the agent did wrongfully dispose of the collaterals, the defendant should file proceedings against him for any loss suffered.

The evidence of PW1 was crucial in this case. He traced the relationship between him and the defendant. Having met the defendant in Miri on 13 October 1984, the defendant signed the margin account, and deposited 287,000 shares over a period of time with the plaintiff the collateral shares for pledging in the margin account.

Although no contract notes were produced by the plaintiff to the defendant for reasons given at the trial, there is no dispute that the transactions in P5B(1) to (38) had been carried out. However, the defendant disputed the fact that these transactions were carried out on his instructions. The contract note we reiterate would not show whether the transactions were made on the instruction of the defendant or not. On this aspect the evidence of PW1 is most relevant. Although he was working as a remisier at the plaintiff's office he was appointed as agent by the defendant under cl. 7 of the agreement between plaintiff and defendant.

Clause 7 reads as follows:

> 7. I hereby, irrevocably appoint your remisier, dealer, director Wee William (NRIC N. 0254979-D) as my agent (hereinafter referred to as 'the agent') to receive all and any notices, statements, certificates, contract notes, demands and proceedings (hereinafter referred to as 'the notices') that are to be sent to me. I declare that all the notices served and/or signified as received by the agent shall be deemed to be duly served and received by me. I, further agree that all or any payments made by me to the agent shall not be deemed to be payment to you until it is actually in your hands.

Apart from the 287,000 shares pledged by the defendant, additional collateral shares were deposited with the plaintiff by the defendant. He stated that all the instructions for the sale of the defendant's shares were received by telephone, and he faithfully carried out defendant's instructions, and the relevant contract notes were sent to the defendant reflecting details of the transactions. The transactions done by the defendant were recorded by PW1 in a book, and was produced as P2 (1-9) at the trial. He stated that the additional collateral shares were given to him because there was a shortfall in the margin.

On 3 September 1985, PW1 was informed by the plaintiff about a shortfall. He immediately informed the defendant by telephone, who promised to top up the shares.

Since the defendant did not top up within five days as stipulated under cl. 3(2) of the margin agreement, the plaintiff sold defendant's shares. PW1 stated categorically in evidence that he would pay up, but failed to do so.

Under cross-examination, PW1 denied that when defendant received the letter of demand, he telephoned PW1 who is alleged to have stated that the letter of demand was a mistake, and he would settle the matter.

By the terms of the agreement dated 15 October 1984, the defendant was given a specific period of time within which to dispute any of the contracts entered into. He did not do so, alleging that he had no knowledge of the contract notes, and the statement of account sent to him. In fact, the defendant is bound by the terms of cl. 7 and 8 of the agreement which have been referred to earlier.

The learned judge further fell in error in arriving at the above conclusion when he misconstrued the evidence of PW1 on this issue *vis-a-vis* the contents of the letter dated 5 March 1986 written by the solicitors for plaintiff to the defendant. Upon close scrutiny of the contents of the letter it merely stated that the defendant's shares had been sold by the plaintiff to reduce the indebtedness of the defendant in accordance of the terms of the agreement dated 15 October 1984. In fact, as stated earlier, under cl. 5(1)(a) and (b) of the agreement the plaintiff had the right to sell the collateral if the proceeds of sale of shares are insufficient to satisfy the sum owing by the defendant without any notice to be sent to the defendant.

The trial judge also erroneously concluded that the collaterals were sold on the instructions of PW1, as stated by PW1 in his evidence. In fact, all PW1 stated was merely to confirm the practice of the plaintiff to sell collaterals under the terms of the agreement whenever the proceeds of the sale of shares are insufficient.

We are driven to hold that trial judge's reasoning was flawed in the material issues as to the circumstances under which the collateral was sold, and thus disagree with his finding that plaintiff had disposed of the shares without the instructions of the defendant. We are further fortified in our conclusion by contemporaneous documentary evidence, which we have since ruled admissible.

A matter of interest before us is that judging from the notes of evidence before us the 2nd trial judge was confronted with conflicting evidence from the plaintiff's and defendant's witnesses. Having said this, the 2nd trial judge made no attempt to recall these witnesses for purposes of evaluating their credibility, when he took over conduct of the said case.

The said trial judge, had to our minds, determined the credibility of these witnesses from the sterile print of the notes recorded by the 1st trial judge. We find this manner of assessment of witnesses slightly discomfiting. To our minds, when an application is made that a case be continued before another judge, and not heard *de novo*, the presiding judge should be given full liberty to recall, and re-examine any witness, and to re-submit on any point, although the trial may be continued on the evidence of the transcript of the earlier judge's notes. See *Shanmugam v. Pitchamany & Anor* [1976] 2 MLJ 222.

In vain this was not done in this instance. Hence, the assessment of evidence of the 2nd trial judge must be viewed with caution. On our part, however, looking at the evidence, both documentary and oral afresh, we find that the plaintiff has established its claim against the defendant on a balance of probabilities. The defendant's counterclaim, we hold is not tenable, and herein we allow the appeal, and dismiss the counterclaim with costs here and below. Judgment is entered for the plaintiff as prayed. The deposit is to be refunded to the plaintiff.